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No. 73-709

In the Supreme Court of the United States

OCTOBER TERM, 1973

CANADIAN PARKHILL PIPE STRINGING LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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On August 1, 1973, the court of appeals rendered a decision with respect to the rights of petitioners' creditors to funds held in *custodia legis*. The fund here involved consisted of the proceeds remaining from the sale of petitioners' construction equipment following satisfaction of a chattel mortgage.[1] The residue in the fund is approximately $600,000, and is subject to a federal tax lien (Pet. App. A24).

In this litigation, petitioners had sought a partial release of the fund on the ground that the government had "seized and tied up" all of their assets, that

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[1] The priority of the chattel mortgage was established in *Avco Delta Corp. Canada Ltd.* v. *United States*, 321 F. Supp. 241 (S.D. Ill.), affirmed, 459 F. 2d 436 (C.A. 7).

the government was acting inconsistently with its position in earlier litigation, and that the government's actions presented a denial of the "constitutional guarantees of due process and representation by and assistance of counsel contained in the Fifth and Sixth Amendments" (Pet. App. A24-A25). The district court granted a partial release of funds from the residual fund to pay costs and attorney's fees "accrued and owing, or necessarily accruing in the future, for the proper and effective representation" of petitioners in the litigation with respect to the ownership of the fund (Pet. App. A25).

The court of appeals reversed, holding that the district court could not order a partial release of funds to pay accrued legal expenses because the payment of those expenses could not affect the ability to obtain counsel in future proceedings. In addition, the court of appeals held that any partial release of funds for the payment of future legal expenses on the basis of a constitutional claim of right to counsel was not ripe for judicial determination (Pet. App. A25).

1. It has long been established that the statutes authorizing summary proceedings and distraint for the collection of tax debts to the government, which were first enacted in 1798,[2] do not violate an individual's rights to due process. *E.g., Phillips* v. *Commissioner,* 283 U.S. 589, 595; *Springer* v. *United States,* 102 U.S. 586, 593. Petitioners' contention (Pet. 14-16) that the statutory provisions for levy and seizure set forth in Section 6331(a) and (b) of the Internal Revenue Code are unconstitutional is therefore unfounded. Nothing in this Court's recent decision in *Fuentes* v.

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[2] See Act of July 14, 1798, c. 75, 1 Stat. 597.

Shevin, 407 U.S. 67, relied upon by petitioners (Pet. 14), is to the contrary. While that decision places limits upon the propriety of summary prejudgment remedies in private litigation, it does not have any bearing upon summary proceedings for the collection of tax debts.

2. The court of appeals correctly decided that the district court had no power to order a partial release of the fund in *custodia legis* for use by petitioners to pay legal fees. The fund in question is impressed with a federal tax lien. Under the statutory system established by Congress to insure collection of the revenue, the government has a lien against all property and rights to property of any person liable to pay any tax who fails to do so after demand (Section 6321, Internal Revenue Code of 1954). The lien arises at the time of assessment and continues until the liability is satisfied or becomes unenforceable (Section 6322).

Except for the special priorities set forth in Section 6323 of the Code, a federal tax lien is valid against the whole world. Here, petitioners do not assert that any attorney's lien exists which would be entitled to priority under Section 6323. There is no precedent for the release of funds covered by a federal tax lien to pay attorney's fees that are not specified under Section 6323(b)(8). Moreover, there is surely no basis for the release of the funds for the payment of attorney's fees which may accrue in the future.

There was ample precedent for the holding of the court of appeals in two of its own earlier decisions. In *Illinois Redi-Mix Corp.* v. *Coyle,* 360 F. 2d 848 (C.A. 7), an interpleaded fund was subject to the competing claims of taxpayer's general creditors, taxpayer, and the government. All of taxpayer's assets

were subject to notices of levy or were impounded in the interpleader action. Although the district court there, as here, had granted the taxpayer's request for a partial release of the fund, the court of appeals reversed, noting (360 F. 2d at 849-850):

> The claim, in substance, is that the vendor corporations will be denied a fair trial in the Tax Court at some time in the future if a portion of the interpleaded fund is not released. But it is presently impossible to determine whether any constitutional violations will occur; that can be decided only after the trial. Therefore, the issue is not ripe for judicial determination. * * *
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> The constitutional question in this case was prematurely decided. * * *

Similarly, in *United States* v. *Brodson,* 241 F. 2d 107 (C.A. 7), a defendant in a criminal tax evasion case sought the dismissal of the indictment against him on the claim that a levy pursuant to a jeopardy assessment left him without funds for counsel and thus unable to obtain a fair trial. The court rejected this argument on the ground that only a post-trial study of the whole case could determine whether the defendant's constitutional right to a fair trial had been violated, a question that might never be reached. See also *Lloyd* v. *Patterson,* 242 F. 2d 742, 744 (C.A. 5), to the same effect. While petitioners cite numerous decisions (Pet. 10-12) establishing the right to counsel in certain types of cases, the constitutional claims in those cases were all considered after trial had occurred. Apart from the fact that there is no constitutional right to counsel in a civil tax proceeding, peti-

tioners' claims related to the future availablility of counsel and are therefore prematurely raised.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.